In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 982

TELEDYNE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The instant petition seeks to raise four issues (Pet. 2) concerning the Board's requirement, enunciated in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966), that employers must furnish to the Board the names and addresses of the employees eligible to vote in a representation election, which information the Board will then make available to all contestants in the election.

1. Issue (c) (whether the Board can compel compliance with the *Excelsior* requirement through a subpoena enforcement proceeding in a federal district court), and issue (d) (whether the *Excelsior* requirement was validly promulgated in an adjudica-

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tory proceeding and not pursuant to the rule-making procedures of the Administrative Procedure Act) are the same as the issues on which certiorari was granted in *National Labor Relations Board* v. *Wyman-Gordon Co.*, No. 463, this Term, on November 12, 1968. Admittedly, these issues have sufficient importance to warrant plenary consideration by this Court, as is confirmed by the grant of certiorari in *Wyman-Gordon*. And there can be no dispute that the holding of the court below on issue (d) is directly contrary to that of the First Circuit in *Wyman-Gordon*.[1] However, the Board believes that these issues will be adequately presented in *Wyman-Gordon*, and that there are no special circumstances in this case relating to these issues which require its separate and additional consideration along with that case.[2] Moreover, the Board has already filed its brief in *Wyman-Gordon*, and we are advised by the Clerk that that case is scheduled for oral argument in the session beginning February 24, 1969. Thus, if certiorari is granted here the effect might well be to delay unnecessarily the resolution of these two issues.[3]

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[1] A copy of the Ninth Circuit's opinion in the instant case, *sub nom. British Auto Parts, Inc.* v. *National Labor Relations Board*, is included as Appendix C to the Board's brief in No. 463 (pp. 73–77).

[2] In its petition for certiorari in *Wyman-Gordon*, the Board called attention to the pendency of other similar cases, including the present one, but urged that there was no occasion for the Court to await their outcome (Petition in No. 463, p. 10, n. 7), and the Court proceeded to grant certiorari.

[3] It should be noted that petitioner has already obtained leave of the parties to file an *amicus* brief in *Wyman-Gordon*, pursuant to Rule 42 (2) of the Revised Rules of this Court.

2. The remaining issues raised by the instant petition go to the validity of the *Excelsior* requirement on its merits. That rule is challenged (issue (a)) as an invasion of the employees' right of privacy, and (issue (b)) as contrary to this Court's decisions in *National Labor Relations Board* v. *United Steelworkers* (*Nutone, Inc.*), 357 U.S. 357, and *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105. These issues, too, could properly be considered and resolved in *Wyman-Gordon*, should the Court determine so to proceed. Although the Board's petition in that case does not specifically raise those issues, the respondent in *Wyman-Gordon* may urge the substantive invalidity of the *Excelsior* requirement as an additional ground for sustaining the judgment of the First Circuit.[4] Accordingly, the Board's brief in *Wyman-Gordon* (pp. 35–40) deals directly and at some length with those issues.

In any event, even if the merits of the *Excelsior* requirement are not reached in *Wyman-Gordon*, there would be no occasion for granting the instant petition insofar as it raises the issues relating to that question. That is so because the decision of the court below upholding the requirement on the merits is correct, and is in accord with the determination of every other court of appeals that has passed on that question (see cases decided by the Second, Fourth,

[4] See the Board's memorandum in Nos. 463 and 578, p. 2, opposing Wyman-Gordon's cross-petition for certiorari (which was denied), and the Board's brief in No. 463, p. 7, n. 5, and p. 35, n. 31.

Fifth and Seventh Circuits which are cited in the Board's brief in No. 463, p. 6).[5]

Accordingly, it is suggested that the Court should defer ruling on the instant petition until it decides *Wyman-Gordon*.[6]

Respectfully submitted.

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[5] Although the First Circuit in *Wyman-Gordon* did not reach the merits of the *Excelsior* rule, it strongly intimated its probable approval of that requirement. Thus, no conflict among the circuits exists on the issues petitioner seeks to raise relating to the merits of the *Excelsior* rule.

[6] The Board has filed a similar response in *Beech-Nut Life Savers, Inc.* v. *National Labor Relations Board*, pending on petition for certiorari, No. 946, this Term.

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